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In the Supreme Court
OF THE
United States

OCTOBER TERM 1968

No. 552

N.V. STOOMVAART MAATSCHAPPIJ "NEDERLAND",
Petitioner,
vs.
STANDARD OIL COMPANY OF CALIFORNIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

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The application by the Ninth Circuit of its "half sight" rule as a rule of law without regard to radar information as a circumstance results in a construction of Rule 16(a) which is contrary to the statute (former 33 U.S.C. §145n; present 33 U.S.C. §1077) and is in conflict with its own earlier decision and the practice of mariners, presenting an important question requiring Supreme Court review 6

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PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case on July 8, 1968.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reprinted at page i in Appendix I,

infra and the memorandum opinion of the District Court is reprinted at page ii of Appendix I, *infra*; neither opinion has yet been officially reported.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit affirming the judgment in this case of maritime collision of the District Court for the Northern District of California filed February 28, 1967, was entered on July 8, 1968.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

The District Court for the Northern District of California, the Honorable Albert C. Wollenberg, decreed that damages be equally divided between petitioner and respondent with respect to the August 29, 1965, collision off the Golden Gate between petitioner's freighter "ROTTI" and respondent's tanker "J. H. TUTTLE". The Court of Appeals for the Ninth Circuit affirmed on July 8, 1968. The questions here presented are:

1. Whether, as a matter of law, it is a violation of the "moderate speed" injunction of Rule 16(a) (33 U.S.C. §145n, §1077) for a vessel to proceed in fog at a speed such that she is unable to stop within one-half her range of visibility (the so-called "half-sight" rule applied in the Ninth Circuit) even though she is effectively using efficient radar?

2. If the navigational faults of the more-to-blame vessel are numerous and grave and the fault of the less-to-blame vessel, if any, is violation of the "half-sight" rule as applied in the Ninth Circuit:

A. Does federal law require that the benefit of the American rule (sometimes known as the "major-minor fault" rule) be denied the less-to-blame vessel in determining whether it is chargeable with contributing fault; or (alternatively)

B. If the less-to-blame vessel is so denied the benefit of the major-minor fault rule and held guilty of contributing fault, does federal law require that the total collision damages be divided equally, however slight the relative fault of the less-to-blame vessel?

STATUTES AND RULES INVOLVED

The pertinent statutes are Rules 16(a) and (b) and 25(a) of the *International Rules for the Prevention of Collisions at Sea* (33 U.S.C. §145n and 146i). These statutes in force at the time of the collision, together with their counterparts (33 U.S.C. §1077(a) (b) and (c)) which became effective September 1, 1965, are set forth in full in Appendix II.

STATEMENT

This suit arose out of a collision in fog at approximately 6:57 p.m. (1857) P.D.T., August 29, 1965, in the entrance channel to San Francisco Bay between the in-

bound freighter "ROTTI" and the outbound tanker "J. H. TUTTLE".

At the commencement of trial, respondent abandoned the factual theories on which it had proceeded up to that point (C.T. 59, 60 and 61)[1] and conceded fault on the part of the "J. H. TUTTLE" (R.T. 5)[2] admitting that the "J. H. TUTTLE" had navigated in the manner described by the "ROTTI" witnesses (R.T. 6) as confirmed by the testimony of independent witness, U. S. Navy flyer Scott B. Wilkes (R.T. 130) who was overhead at the time; Lt. Wilkes' statement and contemporaneous sketches (Libelant's Exhibit 7 at the trial) are included in the certified records.

A summary of the facts of the collision appears in Appendix IV hereto, where brief notations of the navigation of each vessel, keyed to the record, have been superimposed on a photocopy of the revelant portion of U. S. Coast Guard chart 5532, which was respondent's Exhibit 1 at the trial and which bears the notations made by Pilot Sever as he testified at the trial in the District Court. The District Court's description of the navigational events contains some obvious inaccuracies which, however, are not in particulars affecting the questions presented here.

The "ROTTI" before entering fog reduced to her "full harbor maneuvering" speed of 12 knots, commenced blowing the whistle signals called for by Rule 15 and assigned a qualified officer to her radar whose exclusive

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[1] "C.T." herein refers to "Clerk's Transcript."

[2] "R.T." herein refers to "Reporter's Transcript."

duties were to observe, plot and report radar observations. The "ROTTI" observed the "J. H. TUTTLE" on her radar at about 3½ miles and thereafter, as detailed in Appendix IV, the "ROTTI" put her engines successively on "stop", "half ahead", "full ahead", "full astern", "stop" and "full astern" as appropriate to the varying aspects displayed by the "TUTTLE" as she changed her course from one parallel to the north side of the channel to one across and southbound outside the channel to one parallel and outbound south of the channel up to the "J. H. TUTTLE's" hard right turn which brought her back into the channel and into collision with the "ROTTI".

Petitioner proceeded with the trial in the District Court contending that the grave faults of the "J. H. TUTTLE" fully accounted for the collision and were so great as to require any technical fault or debatable error of judgment on the part of the "ROTTI" to be excused under equitable application of the "major-minor fault" rule. Alternatively, petitioner contended that if some fault of the "ROTTI" were found to have contributed to the collision, damages should be divided in proportion to the relative degrees of fault (C.T. 144, 174) in accordance with the rule prevailing in other maritime nations, there having been no definitive statement of the United States Supreme Court precluding a proportionate division of damages.

Respondent proceeded with the trial contending (1) that the gravity of the "J. H. TUTTLE's" fault was irrelevant, (2) that the "ROTTI's" entering fog at a speed greater than permitted her to stop in one-half her visi-

bility was, as a matter of law, a stautory violation of Rule 16(a) (33 U.S.C. §145n (a)) regardless of the fact that she was making effective use of an efficiently manned radar (R.T. 381 line 16), and (3) that any fault found against the "ROTTI", however slight, required the Court to divide damages equally (C.T. 36, 160). The District Court, agreeing with respondent's contentions, found the "ROTTI" guilty of contributing fault and decreed that petitioner bear a full one-half of the total damages resulting from the collision.

Petitioner appealed to the United States Court of Appeals for the Ninth Circuit which on July 8, 1968, affirmed without comment.

REASONS FOR GRANTING THE WRIT

I.

THE APPLICATION BY THE NINTH CIRCUIT OF ITS "HALF-SIGHT" RULE AS A RULE OF LAW WITHOUT REGARD TO RADAR INFORMATION AS A CIRCUMSTANCE RESULTS IN A CONSTRUCTION OF RULE 16(a) WHICH IS CONTRARY TO THE STATUTE (FORMER 33 U.S.C. § 145n; PRESENT 33 U.S.C. § 1077) AND IS IN CONFLICT WITH ITS OWN EARLIER DECISION AND THE PRACTICE OF MARINERS, PRESENTING AN IMPORTANT QUESTION REQUIRING SUPREME COURT REVIEW.

Petitioner urges the Court to accept this case for review because the principles involved are of great practical importance to pilots, shipowners and all others who are responsible for the navigation of vessels. The immediacy of the navigational questions is highlighted by technical developments in radar and other low visibility navigational equipment, similar to that employed by the

"ROTTI", which are routinely employed in air and space navigation at speeds which are multiples of hundreds, and even thousands, of the "ROTTI's" 12 knots which the District Court condemned as excessive as a matter of law.

Radar and other low visibility devices are tools which are at least partially designed to allow speedier and more efficient operation of seagoing vessels. That efficiently manned radar is a "circumstance" to be considered in judging as "moderate" a speed which might be deemed excessive in the absence of such radar, would appear patent, under the wording of the statute, under the holding of the Court of Appeals for the Ninth Circuit in *The Beaver* (9th Cir. 1918) 253 Fed. 312, 314, 315 and as would appear placed beyond question by the September 1, 1965, Addition of the Annex to the rules (33 U.S.C. §1094 See Appendix II). In insisting on rigid application of its "half-sight" rule, the Ninth Circuit rejects the use of radar as a circumstance in determining the moderateness of speed under Rule 16(a) and similarly rejects the practical experience of skilled navigators such as the San Francisco Bar Pilots, who, it was said by an independent witness, usually proceed in the channel in fog "on a full bell" (R.T. 130).

II.

THE CONSTRUCTION OF RULE 16(a) (FORMER 33 U.S.C. § 145n; PRESENT 33 U.S.C. § 1077) BY THE NINTH CIRCUIT'S APPLICATION OF ITS "HALF-SIGHT" RULE WITHOUT REGARD TO RADAR INFORMATION CONFLICTS WITH THE INTERPRETATION GIVEN THIS IMPORTANT NAVIGATIONAL RULE IN THE SECOND CIRCUIT.

It is evident that in the present case the District Court, as it was urged by the respondent (see Appendix III), applied, unmodified, the Ninth Circuit's "half-sight" rule, the classic statement of which appears in the *Silver Palm:*

> "One of the very long-established principles of law in maritime navigation is that a vessel shall not proceed in a fog at a speed at which she cannot be stopped dead in the water in one-half the visibility before her" (The *Silver Palm* (9 Cir. 1937) 94 F.2d 754, 757).

This rule is elsewhere herein referred to as the "half-sight" rule.

The rule of interpretation of a moderate speed as applied in the Second Circuit, in cases not involving the additional information provided by radar, has been the "full-sight" rule as stated in *Anglo-Saxon Petroleum Co. v. United States* (Judge Learned Hand) (2 Cir. 1955) 222 F.2d 75, 77:

> ". . . as everybody knows, the courts have imposed a gloss upon this that 'moderate speed is that at which, if the other vessel also does her duty, the vessel will be able to stop her way before they collide.' ", (citing *The Nacoochee,* 137 U.S. 330, *The Umbria,* 166 U.S. 404 and other cases).

The difference between the approaches taken by the Courts of Appeal for the Second Circuit and for the Ninth Circuit is clearly pointed up in Judge Learned Hand's opinion in *Oil Transfer Corp. v. Westchester Ferry Corp.* (SDNY 1958), 173 F. Supp. 637:

> "It is quite true that the generally accepted rule is that a vessel may travel in a fog at a speed that will allow her to stop within the distance of the existing visibility if she meets another vessel who can also stop within that distance. That would of course mean half the distance of the visibility if the meeting vessel was moving at the same speed, and the Ninth Circuit appears to have made this the test. We have left the question open without such a fixed test: and happily I am not called upon to decide the point here for the following reasons . . . ."

Of even greater moment than the conflict between the Circuits with respect to use of a "half-sight" rule of interpretation as against a "full-sight" rule in this day of increasingly sophisticated electronic aids to low visibility navigation, is the Ninth Circuit's rigid adherence to its "half-sight" rule, disregarding as a circumstance to be considered in gauging the moderateness of speed, the information available through radar. In comparison, the Second Circuit has expressly rejected the suggestion that the "sight rule" is to be rigidly applied, affirming the spirit of the statute that the determination of "moderate speed" under Rule 16 (a) is to be judged in light of all circumstances. Judge Medina stated for the Second Circuit in the *Polarusoil/The Sandefjord* (2 Cir. 1956) 236 F.2d 270, 272:

> "'But these are not rules of thumb to be applied willy-nilly. They are but glosses upon the basic rule

requiring operation at a moderate speed, and, like it, they must be applied according to the particular circumstances of each case . . . . The purpose of the statute, spelled out in the 'sight rule', is to require generally and not absolutely that a vessel proceed only at such speed that it can stop before striking another vessel which comes into the range of its vision."

III.

AN ASSERTED TECHNICAL VIOLATION OF THE NINTH CIRCUIT'S "HALF-SIGHT" RULE BY A LESS-TO-BLAME VESSEL NAVIGATING WITH EFFICIENT RADAR IS NOT A PROPER BASIS FOR DENYING THE BENEFIT OF THE AMERICAN "MAJOR-MINOR FAULT" RULE TO THE LESS-TO-BLAME VESSEL.

The citation by the District Court, incorporated and confirmed by the Court of Appeals for the Ninth Circuit, of *Afran Transport Company v. The Bergechief* (S.D. N.Y. 1959) 170 F. Supp. 893 suggests that both Courts in judging the moderateness of the "ROTTI's" speed under Rule 16 (a) improperly applied the tests of Rule 16 (b) which are not involved in this case as they apply only after the navigating vessel has heard the fog signal of another vessel forward of its beam.

It is fundamental and long established that the determination of moderate speed depends upon contributing circumstances and that considerable weight is to be given the judgment of the vessel's navigators. As was stated in *Lie v. San Francisco and Portland SS Co.* ([1917] 243 U.S. 291, 296):

> "The most cursory reader of this rule (Rule 16) must see that . . . the first paragraph of it gives to the navigator discretion as to what shall be 'moderate speed' in a fog. . . ."

The classic pronouncements of the "major-minor fault" rule are readily found in cases in which the fault claimed against the exonerated vessel was immoderate speed under conditions of reduced visibility:

The Umbria (1897), 166 U.S. 404, 409

> "Indeed, so gross was the fault of the Umbria in this connection that we should unhesitatingly apply the rule laid down in *Alexandre v. Machan* ("*The City of New York,*" 147 U.S. 72, 85, and *The Ludvig Holberg,* 157 U.S. 60, 71, that any doubts regarding the management of the other vessel, or the contribution of her faults, if any, to the collision, should be resolved in her favor. . . ."

and further at page 417:

> "But in cases of this kind much depends upon the density of the fog, and something must be left to the judgment and discretion of the master."

The Ludvig Holberg (1895), 157 U.S. 60, 67, 71:

> "She was clearly not bound to stop solely on account of the fog, and if she had been running dead slow for four or five minutes before the collision she cannot be held in fault for what her previous speed may have been. If she ran twenty miles an hour down to the Narrows, and was running dead slow at the time she first heard the tug's whistle, fault could not be imputed to her for her previous speed . . . As was said in *Alexandre v. Machan* 147 U.S. 72, 85, 'Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is, of itself, sufficient to account for the disaster, it is not enough for such a vessel to raise a doubt with regard to the management of the other vessel . . .'"

As appears in the foregoing classic statements of the American Rule, in a case such as the present where the "J. H. TUTTLE's" faults so fully explain the collision, and may well have placed it beyond any power of the "ROTTI" to avoid, it was inequitable and indeed contrary to federal case law to fail to resolve in the radar-equipped "ROTTI's" favor whatever minor doubt there may have been concerning the moderateness of her quite normal speed on entering the fog.

As is stated in *Griffin on Collision* at page 299:

> "However, all the cases of moderate and immoderate speed turn on questions of prudence or negligence. They cannot be solved merely by applying mechanical tests. Such a rule-of-thumb as the 'visible distance' test has its uses, but it should not be applied blindly without considering all of the surrounding conditions which bear on the question of negligence."

Although every authority [see Gilmore and Black, *The Law of Admiralty*] has criticized the American practice of dividing collision damages equally as unfair to the vessel less to blame, and although the "major-minor fault" rule has been criticized as a somewhat cumbersome and imperfect palliative to the practice of dividing damages equally:

> "An equal division in this case would be plainly unjust; they ought to be divided in some such proportion as five to one. And so they could be but for our obstinate cleaving to the ancient rule which has been abrogated by nearly all civilized nations. Indeed, the doctrine that a court should not look too jealously at the navigation of one vessel, when the faults of the other are glaring, is in the nature of a sop to Cer-

> berus. It is no doubt better than nothing; but it is inadequate to reach the heart of the matter, and constitutes a constant temptation to courts to avoid a decision on the merits." Chief Judge Learned Hand dissenting in *National Bulk Carriers v. United States* (2 Cir. 1950) 183 F.2d 405, 410

it is clear that if the American practice of dividing damages equally is not jettisoned in this case, the circumstances require that the American "major-minor fault" rule be applied to avoid inflicting upon the "ROTTI" an unfair share of the financial loss caused by the grossly culpable navigation of the "J. H. TUTTLE", as was recognized by the Court of Appeals for the Second Circuit in the factually very similar case of *United States v. Shaw, Savill & Albion Co.* (2 Cir. 1949) 178 F.2d 849, 851.

IV.

IF THE AMERICAN "MAJOR-MINOR FAULT" RULE IS NOT APPLIED TO EXONERATE THE "ROTTI", THE EXTRAORDINARY INEQUITY OF THE RESULTING EQUAL DIVISION OF DAMAGES REQUIRES THAT THE SUPREME COURT REVIEW THIS IMPORTANT QUESTION AND ISSUE ITS CLARIFYING DETERMINATION THAT AMERICAN LAW, CONSONANT WITH THE LAW OF MARITIME NATIONS, PERMITS DAMAGES IN CASES OF MARITIME COLLISION TO BE DIVIDED IN PROPORTION TO THE FAULT OF THE VESSELS.

In the circumstances of the present case, an American practice that collision damages be divided equally, modified by application of the American "major-minor fault" rule exonerating the "ROTTI" gives a result which does not do violence to sensibilities of justice. Since it is highly questionable that there was any fault on the part

of the "ROTTI", exoneration of the "ROTTI" under application of the "major-minor fault" rule would approximate the result which would be expected under a system dividing damages in proportion to fault.

No such apology can be made for the practice of dividing damages equally if, in cases such as the present, the application of the practice is not ameliorated by application of the major-minor" fault rule.

It is apparent that in the present case the District Court read the dictum of the Supreme Court in *Halcyon Lines v. Haenn Ship Ceiling Corp.* (1952) 342 U.S. 282 as requiring it to divide damages equally. We submit that the District Court, and the Court of Appeals, erred in so reading the Supreme Court's expression in the *Halcyon Lines* case, and that this error, in conjunction with their failure to apply the "major-minor fault" rule makes manifest the necessity that the Supreme Court accept for review the question whether American maritime law affirmatively requires that maritime collision damages be divided equally regardless of how disproportionate the contributing fault of the two vessels.

The decisions on the subject have been ably reviewed in detail in *McKeel v. Schroeder,* (N.D. Cal. 1963) 215 F. Supp. 756, which decreed an unequal division of damages proportionate to fault, after concluding that the decisions of this Court did not preclude it from so doing. A similar result and conclusion was reached by the late Judge Miner in *N. M. Patterson & Sons, Limited v. City of Chicago* (N.D. Ill. 1962) 209 F. Supp. 576, which was reversed on other grounds in an opinion in which the Court of Appeals for the Seventh Circuit, *N. M. Patterson & Sons,*

Limited v. City of Chicago (7 Cir. 1963) 324 F. 2d 254, 257 stated (we suggest it was not as a ground of decision) that the decisions of the United States Supreme Court did affirmatively require that damages in mutual fault maritime collision cases be divided equally, relying particularly on the opinion of the Supreme Court in *The Atlas* (1876) 93 U.S. 302. It is remarkable that the case before this Court in *The Atlas* was one in which the cargo of an innocent barge had elected to sue only one of two other vessels whose faulty navigation had sunk the barge. The decision was to the effect that the innocent cargo could recover full damages from one offending vessel at fault even though, if both offending vessels had been before the Court, damages might have been divided between the offending vessels. The matter of the degree of apportionment of damages between the offending vessels was a matter much too remote from the case before the Court to serve as any proper basis for the illusion that there has been any determinative decision of the Supreme Court requiring that damages be divided equally in cases involving mutual fault. The status of the cases, and the basis of the error which has developed in several circuits is well discussed in Staring, *Contribution and Division of Damages in Admiralty and Maritime Cases* (1957) 45 Cal. L. Rev. 304.

A helpful analysis and review of the analogous cases involving personal injury in which a proportional division of damages has been allowed, stemming from the Supreme Court's decision in *Max Morris* (1890) 137 U.S. 1 is given in Judge Frank's opinion for the Second Circuit in *Ahlgren v. Red Star Towing & Transp. Co.* (1954) 214 F.2d 618.

CONCLUSION

A writ of certiorari should be granted to assure that the principles of maritime law involved in the questions presented are properly understood and applied in the several circuits.

Dated, San Francisco, California,
September 18, 1968.

Respectfully submitted,

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(Appendices Follow)